IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.339 OF 2003

Oil and Natural Gas Corporation Ltd. ... Petitioners

v/s

M/s Rai's Coastal Survey and Consultancy Services Pvt.Ltd. ... Respondents

Mr M.S. Singhavi i/b M/s Desai and Diwanji for Petitioners.

Mr F.E. Devitre with Mr S. Rustomjee i/b M/s Lekhs Legal for Respondents.

WITH

ARBITRATION PETITION NO.350 OF 2003

M/s Rai's Coastal Survey and Consultancy Services Pvt.Ltd. ... Petitioners

v/s

Oil and Natural Gas Corporation Ltd. and others ... Respondents

Mr F.E. Devitre with Ms S. Rustomjee i/b M/s Lekhs

Legal for Petitioners.

Mr M.S. Singhavi i/b M/s Desai and Diwanji for

Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 14TH MARCH 2005

P.C.: -

1. Both these petitions challenge the same award. Therefore, both the petitions can be conveniently disposed off by a common order.

2. The award relates to a dispute arising out of a contract between the parties for carrying out sea bed engineering surveys, geo-technical investigations and oceanographic data collection along the proposed Second Bassein Hazira Gas Trunk pipeline route. For the purpose of this order I will refer to Oil and Natural Gas Corporation Ltd. as respondents and M/s Rai's Coastal Survey and Consultancy Services Pvt.Ltd. as claimants. The respondents floated a tender in respect of the contract in July 1991, the claimants submitted bid which was accepted by a telex dated 20th December

1991. The formal written contract was signed by the parties on 13th February 1992. Under the contract the work was to be carried out in three stages, which have been set out in Schedule 'E' of the contract. This Schedule sets out the time limit for completion of work under the contract as well as different sub-stages of each stage are also mentioned. The claimants completed the first stage of the work and submitted a final report on 13th July 1992. The respondents issued a notice to the claimants on 21st January 1992 to mobilise vessels for the second stage of work. This work involved drilling of 42 bore holes of which 21 were to be drilled in deep sea water of the Gulf of Cambey and remaining 21 bore holes were to be drilled in shallow water. The drilling of bores in the deep water locations was carried out with the use of vessel 'Teknik Samudra' which was hired by the claimants from OYU Corporation of the Dames and More. The drilling of bore holes in the shallow water was carried out with barge 'OYO'. The vessel 'Teknik Samudra' arrived at Mumbai on 1st April 1992. The claimants offered it for inspection on 2nd April 1992. By its letter dated 3rd April 1992 the respondents pointed out certain deficiencies in this vessel. The claimants by its letter dated 4th April 1992 stated that these deficiencies were removed and offered the vessel for inspection again on 5th April 1992. The respondents cleared this vessel after

inspection. The vessel 'Teknik Samudra' bored 31 holes including 21 in deep water by 21st April 1992. The on-board preliminary report with respect to bore holes BH1 to BH31 was submitted on 27th April 1992. The draft report was submitted on 17th July 1992. 'The 'OYO' barge arrived in Mumbai on 30th May 1992 and reached the site of survey on 13th June 1982. However, the barge was washed out due to swelling of the sea and capsized at the site. At the request of the claimants, it was agreed between the parties that the claimants should drill bore holes Nos.41 and 42 to the depth of 17 metres instead of 6 metres at no extra cost to the respondents, close to the sea shore by the staging process and conduct geo-technical investigation at these two bore holes, that on the basis of the data collected from these two bore holes, should prepare an 'interpolated' report based on the assumed soil profile and soil parameters between bore holes BH 32 to BH 40 and that such assumed soil profile and soil parameters should be verified by test boring to be conducted after the monsoon. The claimants drilled bore hole Nos.41 and 42 using the stating process. The report on these two bore holes and the report of the preliminary assessment of likely soil conditions between proposed bore holes BH 32 to 40 (known as interpolated report), were submitted by the claimants on 7th August 1992. On 1st September 1992, the respondents asked the claimants to carry out

actual geo-technical investigation of bore holes Nos.32 to 40 during the post monsoon 1992 period. The claimants mobilised 'OYO' barge on 31st October 1992 and completed the nine bore holes i.e. Nos.32 to 40 by 9th November 1992. The draft report of this work was submitted by the claimants on 27th November 1992. The respondents said that it had no comments on this draft report and asked the claimants to submit the final report. The final report was submitted by the claimants on the letterhead of Dames and Moore on 2nd June 1993. On 5th May 1992 the respondents issued the intimation for mobilisation under the third stage. The vessel for this work was mobilised on 10th May 1992. The survey and data collection were completed shortly thereafter. The on-board preliminary report was submitted by the claimants on 2nd June 1992. The final report was submitted on 13th July 1992.

3. The respondents levied liquidated damages on the claimants on the ground of delay in performing various stages of work under the contract. The respondents deducted total amount of Rs.44,79,003.75. According to the respondents, there was delay of 405 days and the liquidated damages were levied at the rate of 10 % of the contract value as per clause 9.2 of the contract.

4. The claimants' bid amount which was accepted by the respondents was Rs.44,79,003.75 which included foreign exchange component of U.S. $ 9,49,600. At the time the parties entered into the contract, the exchange rate was fixed by the Government under the Foreign Exchange Regulation Act 1973 and the fluctuation of this rate was within a narrow range. The Government of India in consultation with the Reserve Bank of India, introduced the 'Liberalised Exchange Rate Management System (LERMS) with effect from 1st March 1992. Under this system those who needed to import goods and services, had to buy foreign exchange at market determined rates from authorised dealers. However, in respect of certain specified priority imports and transactions, provision was made in the Scheme for making available foreign exchange at the official rate. After 1st March 1992, the claimants could not get U.S. dollars required for hiring foreign vessel and for services of foreign personnel for carrying out the work under the contract at the official rate of foreign exchange from the Reserve Bank of India. The claimants had to buy its requirement of U.S. dollars at the market determined rates from authorised dealers. The claimants have averred that it had to obtain U.S. dollars for the purpose of the contract at the rate of Rs.31 per Dollar and as a result, it had to incur additional cost to the extent of Rs.40,65,163.03.

5. The disputes arose between the parties. As per the arbitration clause, the mattes were referred to Arbitrators. Before the Arbitral Tribunal, the claimants made following claims :-

i) Rs.44,79,003.75 which the respondents had deducted as liquidated damages out of the bills payable to the claimants, together with interest thereon at the rate of 21 % p.a.

ii) Rs.40,65,163.03 towards the additional cost incurred by the claimants on account of change of the foreign exchange rate, together with interest thereon at the rate of 21 % p.a.

iii) Rs.12,17,535.00 towards interest on delayed payments of the claimants' bills by the respondents under the contract and

iv) Further interest and costs of this arbitration.

6. The Arbitral Tribunal found that the claim of

the respondents that delay was of 405 days was not correct. According to the Arbitral Tribunal, delay was of 105 days. It upheld the contention of the claimants that there was no loss caused to the respondents even assuming that there is some delay. The Arbitral Tribunal found that for the loss which is caused, liquidated damages in the sum of Rs.8,00,000/- would be reasonable compensation and therefore, the respondents were directed to refund the amount of Rs.36,79,003.75 to the claimants. The Arbitral Tribunal rejected the claim made by the claimants towards the additional cost incurred by the claimants on account of change of foreign exchange rate. The Arbitral Tribunal also rejected the claim of the claimants for interest on delayed payments. Arbitration petition No.339 of 2003 has bee filed by the respondents challenging the award in so far as it directs the respondents to refund the amount of Rs.36,79,003.75 to the claimants and the claimants have filed arbitration petition No.350 of 2003 challenging the entire award. According to the claimants, the Arbitral Tribunal has committed an error in holding that liquidated damages to the tune of Rs.8,00,000/- were liable to be recovered from the claimants.

7. The learned counsel appearing for claimants submits that even if it is assumed that there is delay

in completing the contract as has been held by the Arbitrators, then also as the respondents had not proved or even pleaded what was the nature of loss suffered by it, there was no question of the respondents being entitled to claim liquidated damages. According to the learned counsel, both under section 73 as well as section 74 of the Indian Contract Act, for levy of damages, proof of loss is necessary though in cases falling under section 74, it may not be necessary for the respondents to prove the extent of loss. The learned counsel, in support of this proposition, relies on the judgment of the Supreme Court in the case of ONGC v/s SAW Pipes Ltd., reported in JT 2003(4) SC 171 and the judgment of this Court in the case of Jagson International Ltd. v/s ONGC, reported in 2004(2) Bom.C.R. 272.

8. The learned counsel further submits that so far as second claim in relation to the foreign exchange rate is concerned, the finding of the Arbitral Tribunal that there was no change in the law and there was merely a change in the policy to be followed under the law is incorrect. According to the learned counsel, under the Foreign Exchange Regulation Act, at the time when the contract was entered into, the foreign exchange rate was fixed by the Reserve Bank of India. As a result of change in policy, now the claimants were not entitled to

get any foreign exchange at the rate fixed by the Reserve Bank of India. Now, the rate of foreign exchange so far as the claimants are concerned, was governed by the market condition. According to the learned counsel, this was fundamental change in policy, it amounted to change in law and therefore, the claimants were entitled to get the amount in this regard. In so far as the claim in respect of interest on delayed payments is concerned, the learned counsel submits that the Arbitrators have not considered the question of levy of interest on the delay in payment of amount regarding mobilisation and de-mobilisation. This amount, according to the terms of the contract, was payable within 30 days, but the amount was paid with considerable delay and therefore, the claimants were entitled to payment of interest. Though this question was specifically raised, according to the learned counsel, it has not been decided by the Arbitral Tribunal.

9. So far as the first question is concerned, the learned counsel appearing for respondents submits that the finding of the Arbitrators that delay is of 105 days is wrong. he submits that the respondents had specifically claimed that because of delay in completion of the work, the respondents had suffered losses. According to the learned counsel, proper reading of

provisions of section 74 shows that no proof of loss is necessary when the amount of damages is agreed between the parties in the contract itself. The learned counsel, in support of this proposition, relies on a judgment of the Supreme Court in the case of Sir Chunilal V. Mehta and Sons Ltd. v/s Century Spinning and Manufacturing Co.ltd., reported in AIR 1962 SC 1314. According to the learned counsel, as the parties to the contract had agreed that in case of breach of contract by the claimants, the respondents would be entitled to claim damages and the rate at which the damages are to be claimed is also mentioned, there is no necessity of the respondents proving that any loss is caused to them. I have heard learned counsel appearing for respondents on the aspect of foreign exchange as also interest.

10. Now, so far as the first question is concerned, the relevant clause is clause 9 of the contract which reads as under :-

"9.0 LIQUIDATED DAMAGES

9.1 The contractor agrees that time shall be the essence for the scheduled completion date as per time schedule given in Schedule E for the works and reports submission.

9.2 If the contractor fails to complete the entire work including mob and demob comprising the total lumpsum project before the scheduled completion date fixed for the work or at any time repudiates the contract before completion of the work, or at any time the vessel(s) equipments are confiscated under clause 4 of this Contract during the execution of Commission's operations, the Commission may without prejudice to any other right or remedy available to the commission.

a) Receive from the Contractor as ascertained and agreed liquidated damages and not by way of penalty, a sum of equivalent to 1/2 percent of the total contract value for each week's delay or prorate part thereof, buy and the scheduled completion date subject to a maximum of 10 % of the total contract value even though the Commission may accept delay in completion after the expiry of the Schedule completion date and/or. "

. Perusal of the above clause of the contract shows that in case there is delay in completing the entire work, the respondents would be entitled to receive from the claimants as ascertained and agreed liquidated damages and not by way of penalty a sum equivalent to 1/2 percent of the total contract value for each week's delay. Thus, by this clause, a provision has been made for the respondents to receive as liquidated damages a sum as per the formula contained in this clause. In the claim statement, the case of the claimants is stated thus :-

> "40. The Claimants submit that in any event, the draft reports for Stage II were submitted in July 1992. The Respondents' response to the reports was that they had no comments and the Claimants were requested to submit the final report on the entire geo-technical work under Stage 2. This final report was submitted by the Claimants in early August 1992. The Claimants submit that as the Respondents accepted the report prepared without any comments and requested that it be formalised and finalised in the form of a final report, they were precluded from seeking to levy liquidated damages for the work done

merely in order to confirm the findings in the same.

41. The Claimants submit that in any case, the findings in the report submitted on the actual geo-technical investigations in October 1992 confirmed and corroborated in toto the findings in the interpolated report which had already been accepted by the Respondents. The Respondents stated that they had no comments on and accepted this Report without any changes whatsoever. In any view of the matter, therefore, the time taken to perform this work was of no significance as no further action was required as a result of the same.

42. The Claimants submit that it is important to note that the work carried out in order to corroborate the findings of the interpolated report did not cause any loss to the Respondents and in fact the Respondents have not suffered any loss due to the alleged delay in performance of the work at all. It is the admitted position that the work under the present contract was required only in order to collect data which was to be incorporated in the Tender for coating and laying the pipeline

which was floated by the Respondents. The Claimants understand that this tender was not delayed and was floated by the Respondents with the use of data contained in the reports submitted by the Claimants. As far as the Claimants are aware, the invitation to tender contained a clause to the effect that if necessary, an addendum would be issued by the Respondents to the Tender. This clause was apparently inserted in order to meet the eventuality of there being a change in the data incorporated arising out of the subsequent work under the present contract. As far as the Claimants are aware, no such addendum was issued as the work carried out by the Claimants confirmed the earlier findings. The Claimants, therefore, submit that the Respondents have not suffered any loss due to the alleged delays in completion of the work by the Claimants and were therefore not entitled to recover any liquidated damages from the claimants.

. In paragraph 40 of the written statement, the respondents stated thus :-

"40. With reference to para 42 of the

Statement of Claim the Respondent reiterates what is stated in para 2(a) of this Written Statement and denies that no loss has been caused to the Respondent due to delay of the Claimant in execution of the work under the contract. The Respondent states that the clause enabling the Respondent to amend the terms of a bid package is found in most of the tenders floated by the Respondent. The Respondent says and submits that it is not for the Claimant to advise the Respondent as to the procedures of floating tenders. The Respondent denies that they have not suffered any loss due to delay in completion of various stages of the project on account of the Claimant. The Respondent further states that the loss caused to Respondent is incalculable and incapable of being computed in monetary loss. The Respondent respectfully says and submits that the loss, damage and inconvenience caused to the Respondent was brought to the notice of the Claimant on several occasions to which the Claimant assured the Respondent that they would improve their performance. However, despite assurances, the Claimant willfully defaulted and further delayed submissions of the

required reports resulting in greater loss to the Respondent. The Respondent says and submits that the entire loss caused to the Respondent is incapable of being quantified in monetary terms. The Respondent further says and submits that the Claimant are estopped from contending that the Respondent has not suffered any loss. The Respondent therefore respectfully says and submits that the Respondent ought not to be required to prove the actual loss suffered by it for reasons set out hereinabove. The Respondent denies that the Respondent is not entitled on the grounds alleged or otherwise or at all for any amount as liquidated damages or otherwise to any amount. Moreover, the onus of proving that no loss has been caused to the Respondent lies on the Claimant themselves."

. Perusal of the above ;pleadings shows that the case of the claimants was that firstly there was no delay in completing the work and even if it is assumed that there is delay, there is no loss caused to the respondents and therefore, there is no question of the claimants being liable to pay any damages. The reply of the respondents was that the respondents denied that there was no loss caused to the respondents because of

the delay, but according to the respondents, the loss was incapable of being quantified in monetary terms. It was also the case of the respondents that they are not required to prove the extent of loss suffered by them. It was also the case of the respondents that the burden to prove that no loss is caused to the respondents lies on the claimants.

11. Perusal of the award shows that the Arbitral Tribunal, after considering the facts, has held that there was delay of 105 days. Though the correctness of this finding was assailed before me, in my opinion, this being the finding of fact, it will not be possible for me to disturb this finding. So far as the aspect of delay resulting in loss is concerned, the Arbitral Tribunal has observed thus :-

> "I am unable to accept the contention of the Claimant that there was no delay in completing work under contract and even if there was some delay, no loss was caused to the Respondent. if the Claimant had submitted the preliminary report within the time stipulated in Schedule 'E', the Respondent could have floated the subsequent tender 105 days earlier. This delay has undoubtedly caused to the Respondent some loss."

. The above finding shows that according to the Arbitral Tribunal, because of the delay, the respondents could not float the subsequent tender earlier and this according to the Arbitral Tribunal, amounts to loss. Perusal of the pleadings of the parities which have been quoted above shows that this was not even the case of the respondents. In fact, the respondents nowhere indicate as to what was the nature of loss suffered by them. In case of Jagson International Ltd., after considering the judgment of the Supreme Court in the case of SAW Pipes Ltd. as also other judgments, this Court has taken the view that for claiming damages either under section 73 of the Indian Contract Act or under section 74 of the said Act, proof of loss is necessary. In case the amount of damages is predetermined in the contract, it will not be necessary to prove what is the extent of the loss, but there is no escape from proving the nature of loss suffered and that in fact loss is suffered. In other words, neither under section 73 nor under section 74 of the said Act, damages can be awarded without there being an element of loss to the party who is claiming damages. Though the learned counsel appearing for respondents submitted that this is not the correct view of the matter, as I have already taken this view, and I do not see any reason to take a different view.

12. Perusal of the judgment of the Supreme Court in SAW Pipes Ltd.'s case shows that the Supreme Court, after reproducing the provisions of sections 73 and 74 of the Indian Contract Act, in paragraph 46 has observed thus :-

> "46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise int he usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. however, when the terms of the

> contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation to prove the same."

. From the above paragraph, it is clear that even in case there is a predetermined amount of damages, if the Court comes to the conclusion that no loss is likely to occur because of the breach, the Court can disallow compensation. Therefore, in my opinion, in every case where damages are claimed for breach of contract, proof of loss is a condition precedent. In the present case, as observed above, the respondents have not even pleaded what was the nature of loss suffered by it because of the delay. In this view of the matter therefore, in my opinion, the Arbitral Tribunal was in error in holding that damages to the tune of Rs.8,00,000/- could have been awarded. The finding to that extent, in my opinion, is liable to be set aside. It is accordingly set aside. It is held that the respondents were not justified in deducting any amount from the amount payable to the claimants on

account of damages for delay in completion of the work. The respondents are liable to refund that amount to the claimants.

13. So far as the aspect of additional cost on account of foreign exchange is concerned, the relevant clause is 11.5.1 which reads thus :-

> "11.5.1. If there is a change in or enactment of any law in India after the date of placement of LOI/TOI which results in subsequently additional cost / savings to Contractor on account of such enactment having effect on this Agreement, the Commission shall reimburse the Contractor or Contractor shall pay to the Commission as the case may be for such cost / savings and the two parties shall discuss and mutually agree on the method and extent to which the Contractor / Commission should be compensated / paid for, provided, however, that provision of this Article shall not apply to personnel corporate taxes and customs duties."

. Perusal of this clause shows that this clause comes into play only if there is a change in any enactment or law in India after the date of the

contract. Therefore, unless the existing statutory law is either amended or a new law is enacted, in my opinion, this clause will not come into the picture. In the present case, it is nobody's case that any existing law was changed by amendment or any new law on the subject was enacted. Perusal of the award shows that the Arbitral Tribunal, by referring to the correspondence between the parties, has held that the claimants had agreed not to claim any advantage on account of fluctuation and the claimants were bound by that commitment. I do not find any patent error of law in the finding recorded by the Arbitral Tribunal. So far as the aspect of interest on delayed payment is concerned, perusal of the claim statement shows that the claimants had not claimed interest on account of mobilisation and de-mobilisation advances separately. Even if it is assumed that such a claim was made and that those amounts were payable within 30 days, the interest will become payable only after complying with the requirements of the Interest Act. The Interest Act requires notice to be given claiming interest from the date to be mentioned in the notice. I have not been pointed out any such notice by the claimants. Therefore, at the most, the claimants may become entitle to interest from the date of lodging the claim, but that is not the claim. The claim is for interest on delayed payment. Therefore, I do not find any justification for

any modification of the award in this regard.

14. In the result therefore, arbitration petition No.339 of 2003 fails and is dismissed, arbitration petition No.350 of 2003 is partly allowed, the respondents are directed to refund to the claimants Rs.44,79,003.75 with interest at the rate of 11 % p.a. from the date of deduction till the date of payment. The respondents shall pay cost of both the petitions to the claimants as incurred by the claimants.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.